

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ARTHUR E. FISHER,
Petitioner,

DOCKET NUMBER
CB-1205-12-0021-U-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency,

DATE: January 30, 2013

and

DEPARTMENT OF THE INTERIOR,
Agency.

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Arthur E. Fisher, Siletz, Oregon, pro se.

Laura Ann Pfeffer, Esquire, Washington, D.C., for the Office of Personnel
Management.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

FINAL ORDER

The petitioner asks the Board to review an Office of Personnel Management (OPM) regulation that permits an agency to credit nongovernment service in determining a first-time government employee's annual leave accrual rate, if the agency makes the crediting determination before the employee enters on duty. MSPB Docket No. CB-1205-12-0021-U-1, Request File (RF), Tab 1 at 2; *see* [5 C.F.R. § 630.205](#)(d). For the reasons discussed below, we DENY the petitioner's request. This is the final decision of the Merit Systems Protection Board in this proceeding. Title 5 of the Code of Federal Regulations, section 1203.12(b) ([5 C.F.R. § 1203.12](#)(b)).²

BACKGROUND

The petitioner joined the Department of the Interior (DOI) after “a substantial career outside of government.” RF, Tab 1 at 3. “[S]ome months” after entering on duty, he requested that DOI credit his prior nongovernment work experience to increase the rate at which he accrued annual leave pursuant to [5 U.S.C. § 6303](#)(e) and [5 C.F.R. § 630.205](#). RF, Tab 1 at 3. DOI denied his request, citing [5 C.F.R. § 630.205](#)(d), which requires that documentation of prior work experience be provided and that the employing agency's crediting determination be made before the new employee enters on duty. RF, Tab 1 at 3. The petitioner contended that DOI concealed this regulation from him. *Id.* He also contended that the requirement that the employing agency make the crediting determination before the employee enters on duty violates Congress's intent in

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the request for regulation review in this case was filed before that date. Even if we considered the request under the previous version of the Board's regulations, the outcome would be the same.

enacting [5 U.S.C. § 6303](#)(e) and the merit system principles set forth in [5 U.S.C. § 2301](#). RF, Tab 1 at 3-6.

OPM moved to dismiss the petitioner’s review request, asserting that the petitioner failed to make a prima facie case of Board jurisdiction because he did not explain how the regulation has required or would require an agency employee to commit a prohibited personnel practice. RF, Tab 7 at 9. OPM also asserted that, even if the petitioner had established jurisdiction, the Board should decline to exercise its review authority because the request did not satisfy the discretionary review factors set forth in *McDiarmid v. United States Fish and Wildlife Service*, [19 M.S.P.R. 347](#) (1984) (likelihood that the issue will be timely reached through ordinary channels of appeal; availability of other equivalent remedies; extent of the regulation’s application; and strength of the arguments against the validity of implementing the regulation). RF, Tab 7 at 8; *see McDiarmid*, 19 M.S.P.R. at 349. OPM noted that the petitioner had not pursued a remedy through appropriate DOI channels (though OPM did not explicitly assert that such a remedy existed); that the petitioner had not alleged that the regulation had a widespread effect on the federal service; and that the petitioner had not demonstrated that the regulation was invalid. RF, Tab 7 at 8-9.

In response, the petitioner alleged that the regulation violated “Merit Principles . . . Nos. 1, 2, 3, 5 and 6.” RF, Tab 8 at 6. He also alleged that the regulation violated “Prohibited Personnel Practice . . . No. 12, Violation of a Law.” *Id.* His argument for the violation of [5 U.S.C. § 2302](#)(b)(12) appears to be twofold: first, that the regulation violates the statute it was intended to implement ([5 U.S.C. § 6303](#)(e)) because it “negate[s]” the statute’s recruitment incentive; and second, that DOI’s alleged concealment of the requirement that crediting determinations be made before the employee enters on duty violates all the merit system principles except numbers 7 and 8. *Id.* In addition, the petitioner contended that the regulation had a widespread effect and that he had attempted to pursue a remedy within DOI but did not succeed. *Id.* at 6-7.

ANALYSIS

The Board has original jurisdiction to review rules and regulations promulgated by OPM. [5 U.S.C. § 1204](#)(f). The Board is authorized to declare an OPM rule or regulation invalid on its face if the Board determines that the provision would, if implemented by an agency, on its face, require any employee to violate a prohibited personnel practice as defined by [5 U.S.C. § 2302](#)(b). *See also* [5 U.S.C. § 1204](#)(f)(2)(A). Similarly, the Board has authority to determine that an OPM regulation has been invalidly implemented by an agency, if the Board determines that the provision, as implemented, has required any employee to violate a prohibited personnel practice. [5 U.S.C. § 1204](#)(f)(2)(B).

The Board's regulations direct the individual requesting review to provide the following information: a citation identifying the challenged regulation; a statement (along with any relevant documents) describing in detail the reasons why the regulation would require or has required an employee to commit a prohibited personnel practice; specific identification of the prohibited personnel practice at issue; and a description of the action the requester desires the Board to take. [5 C.F.R. § 1203.11](#)(b); *see Roesel v. Office of Personnel Management*, [119 M.S.P.R. 15](#), ¶ 7 (2012); *DiJorio v. Office of Personnel Management*, [54 M.S.P.R. 498](#), 500 (1992). This information is required to state a case within the Board's jurisdiction.

Here, the petitioner alleges that [5 C.F.R. § 630.250](#)(d) violates merit system principles 1, 2, 3, 5, and 6 and [5 U.S.C. § 2301](#)(b)(1), (b)(2), (b)(3), (b)(5), and (b)(6).³ RF, Tab 8 at 6. However, alleged violation of the merit system principles alone does not give rise to Board jurisdiction; rather, the

³ Although the petitioner specifically mentions the merit system principles, his citation is to the list of prohibited personnel practices. RF, Tab 8 at 6. His statement that “#6 contains the word ‘retain’” makes clear that he indeed is referring to the merit system principles, as the sixth principle relates to employee retention. *Id.*; *see* [5 U.S.C. § 2301](#)(b)(6); *cf.* [5 U.S.C. § 2302](#)(b).

petitioner must allege that the challenged regulation requires commission of a prohibited personnel practice, as defined in [5 U.S.C. § 2302\(b\)](#). *See DiJorio*, 54 M.S.P.R. at 500; [5 C.F.R. § 1203.11\(b\)](#). The merit system principles are hortatory and do not themselves impose legal requirements. *See Brooks v. Office of Personnel Management*, [59 M.S.P.R. 207](#), 212 (1993), *superseded on other grounds as recognized in Johnson v. Office of Personnel Management*, [93 M.S.P.R. 265](#), 269 n.5 (2003); [5 U.S.C. § 2301\(b\)](#) (“Federal personnel management *should be implemented* consistent with the following merit system principles”) (emphasis added). Therefore, failure to adhere to the merit system principles is not by definition commission of a prohibited personnel practice under section 2302(b). *See Brooks*, 59 M.S.P.R. at 212. The petitioner’s claim that the challenged regulation violates various merit system principles thus does not establish Board jurisdiction over his review request, unless he can identify a specific prohibited personnel practice committed by the agency.

The petitioner specifically alleges that DOI’s denial of his crediting request under [5 C.F.R. § 630.205\(d\)](#) constituted a personnel practice prohibited by [5 U.S.C. § 2302\(b\)\(12\)](#). RF, Tab 8 at 6. That provision states: “Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority – . . . (12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.” We understand the petitioner to contend that [5 C.F.R. § 630.205\(d\)](#) requires commission of a prohibited personnel practice under [5 U.S.C. § 2302\(b\)\(12\)](#) because: (1) the regulation violates [5 U.S.C. § 6303\(e\)](#) because it negates the statute’s recruitment incentive; and (2) the regulation, or DOI’s alleged concealment of the regulation, violates merit system principles 1, 2, 3, 4, 5, 6, and 9. *See* [5 U.S.C. § 2301\(b\)](#); RF, Tab 8 at 6.

As we have explained, the second part of this contention does not establish a prohibited personnel practice because it concerns the merit system principles themselves rather than a law, rule, or regulation implementing or directly concerning them, as required by section 2302(b)(12). *See Brooks*, 59 M.S.P.R. at 12. However, we also construe the petitioner's brief as contending that the challenged regulation violates [5 U.S.C. § 6303\(e\)](#) and that this statute is a law "implementing, or directly concerning, the merit system principles contained in section 2301." [5 U.S.C. § 2302\(b\)\(12\)](#); *see* RF, Tab 8 at 6. Without determining the merit of these contentions, we conclude that this allegation establishes a claim within the Board's jurisdiction under [5 U.S.C. § 1204\(f\)](#).

In determining whether to exercise its regulation review authority, the Board considers, among other things, the likelihood that the issue will be timely reached through ordinary channels of appeal; the availability of other equivalent remedies; the extent of the regulation's application, and the strength of the arguments against the validity of its implementation. *National Treasury Employees Union v. Office of Personnel Management*, [118 M.S.P.R. 83](#), ¶ 8 (2012); *McDiarmid*, 19 M.S.P.R. at 349. Here, consideration of these factors persuades us to decline the request for review.

Regarding the first and second factors, we have little information regarding whether the issue may be reached through ordinary channels of appeal or whether other remedies exist. The petitioner asserted that he attempted to appeal DOI's decision through internal agency procedures to no avail. RF, Tab 8 at 7. OPM contested this claim but did not assert that any relief would have been available if the petitioner had sought it. *See* RF, Tab 7 at 8 ("[T]he Appellant has not pursued a remedy, if any is available"). As for the third factor, the petitioner asserted that the regulation's effect is widespread, which OPM did not deny. *See* RF, Tab 8 at 6-7. However, we base our decision primarily on the fourth factor, as we find the petitioner's argument against the regulation's validity to be weak.

The petitioner contended that the regulation contravenes the statute it is intended to implement, [5 U.S.C. § 6303](#)(e), and that this violates merit system principles 1, 2, 3, 4, 5, 6, and 9. RF, Tab 8 at 6. The statute provides, in pertinent part:

(1) . . . the Office of Personnel Management shall prescribe regulations under which, for purposes of determining years of service under subsection (a), credit shall, in the case of a newly appointed employee, be given for any prior service of such employee that would not otherwise be creditable for such purpose, if –

(A) such service –

(i) was performed in a position the duties of which directly relate to the duties of the position to which such employee is so appointed; and

(ii) meets such other requirements as the Office may prescribe; and

(B) in the judgment of the head of the appointing agency, the application of this subsection is necessary in order to achieve an important agency mission or performance goal.

[5 U.S.C. § 6303](#)(e)(1).

As commanded by the statute, OPM prescribed regulations regarding credit for prior service, of which [5 C.F.R. 630.205](#)(d) – the regulation challenged by the petitioner – is one. The regulation provides: “An employee must provide written documentation, acceptable to the agency, of his or her prior work experience. . . . The head of an agency or his or her designee must make the determination to approve an employee’s qualifying prior work experience before the employee enters on duty.” [5 C.F.R. § 630.205](#)(d).

We see nothing in the regulation that contravenes the statute. Even if we did, the petitioner has not adequately explained how this would violate any of the merit system principles. For example, although the petitioner claimed that requiring the agency to determine prior work credit before the employee enters on duty violates principles of fair recruitment, *see* RF, Tab 8 at 6, he did not explain how this requirement impedes recruitment from qualified individuals or prevents

fair and open competition – the subjects of the first merit system principle, *see* [5 U.S.C. § 2301](#)(b)(1). Nor is any violation apparent when we compare the statute and the regulation with the merit system principles. Accordingly, we decline to exercise our discretion to review [5 C.F.R. § 630.205](#)(d). The petitioner's request for regulation review is DENIED.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.caafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and

Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.